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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAMES C. FLEDGER
PETITIONER
v.
DANIEL L. REDLOCK, et al.
RESPONDENTS
and
DANIEL L. REDLOCK, et al.
PETITIONERS
v.
JAMES C. FLEDGER
PETITIONER

CONSOLIDATED CASES

On Writ of Certiorari to the Arkansas Supreme Court

BRIEF FOR RESPONDENTS IN DOCKET NO. 94-28

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Docket No. 94-29

PARAGON PRINTING & STATIONERY COMPANY, INC.

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QUESTION PRESENTED

Was the imposition of Arkansas' state and local Sales Taxes on charges made for cable television services unconstitutional, during the period from July 1, 1987, through June 30, 1989, in the face of the Respondents' First Amendment based challenge, because such excise taxes were not also imposed (1) upon subscription fees charged by program providers for supplying "scrambled" satellite television broadcast services or (2) upon charges made for the sale of other goods or services by similarly situated businesses in Arkansas that were involved in the mass communications media?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner James C. Pledger is the former Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration and the person who is charged by statute with administering the state and local Sales Taxes imposed in Arkansas.

Respondents here are cable television operators and subscribers who are representatives of a certified class of taxpayers that are subjected to the state and local Sales Taxes imposed by Act 188 of 1987, before amended by Act 769 of 1989, and include the following named Plaintiffs:

Respondent Daniel L. Medlock is an individual, a subscriber to cable television services, and a resident of Little Rock, Pulaski County, Arkansas.

Respondent Community Communications Company is an independent corporation that has no subsidiaries or affiliates, and which operates six cable television franchises in south and southeast Arkansas.

Respondent Arkansas Cable Television Association, Inc. (ACTA) is an independent not-for-profit corporation that has no subsidiaries or affiliates, and is a trade organization composed of the operators of approximately 80 cable television systems in Arkansas.

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Nos. 90-29, 90-38

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. PLEDGER
PETITIONER
v.
DANIEL L. MEDLOCK, et. al.
RESPONDENTS
and
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v.
JAMES C. PLEDGER
PETITIONER

CONSOLIDATED CASES

On Writ of Certiorari to the Arkansas Supreme Court

BRIEF FOR RESPONDENTS IN DOCKET NO. 90-29

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (App. B, p. 3a, Petition in Docket No. 90-38) is reported at 301 Ark. 483, 785 S.W.2d 202. The Order of the Supreme Court of Arkansas denying the Petitions for Rehearing is unreported (App. A, p. 1a, Petition in Docket No. 90-38).

The Opinion (App. D, p. 11a, Petition in Docket No. 90-38) and the Order and Judgment (App. C, p. 9a, Petition in Docket No. 90-38) of Chancellor Lee A. Munson of the Pulaski County Chancery Court are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. B, p. 3a, Petition in Docket No. 90-38) was rendered on February 28, 1990, and timely filed Petitions for Rehearing by both the Petitioners and the Respondents were filed and denied on April 2, 1990 (App. A, p. 1a, Petition in Docket No. 90-38). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

U.S. Constitution:

Amendment 1. Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Statutes:

Act 188 of 1987 (in effect from July 1, 1987, through June 30, 1989), Ark. Code Ann. § 26-52-301(3)(D), is set forth in its entirety in the Petition in Docket No. 90-38 (App. E, pp. 23a-25a).

STATEMENT OF THE CASE

The Respondents have filed their own separate Petitioners' Brief on the Merits in the action styled *Medlock v. Pledger*, Docket No. 90-38, which action has been consolidated with this one for purposes of briefing and oral argument. The Respondents here (Petitioners in Docket No. 90-38) have set forth in their separate Petitioners' Brief on the Merits in Docket No. 90-38 an extensive Statement of the Case, which statement is substantially more detailed than the Statement of the Case set forth by Petitioner Pledger in his brief filed in this proceeding (Docket No. 90-29).

Therefore, rather than simply republishing such Statement of the Case in this brief, the Respondents here adopt by reference their Statement of the Case, as set forth in their own separate Petitioners' Brief on the Merits in Docket No. 90-38.

SUMMARY OF THE ARGUMENT

The Arkansas Supreme Court decided that the imposition of Arkansas' state and local Sales Taxes upon charges for cable television service (by the adoption of Act 188 of 1987) was unconstitutional for periods from July 1, 1987, through June 30, 1989. However, upon the amendment of Act 188 of 1987 by Act 769 of 1989 (effective July 1, 1989), the Arkansas Supreme Court prospectively approved the constitutionality of the amended statute, in response to the cable operators' and taxpayers' First Amendment based challenge to the State's statutory scheme for imposing Sales Taxes upon businesses involved in the print and electronic segments of the mass communications media in Arkansas.

The cable operators and taxpayers submit that this Court should reject the State of Arkansas' attempt to overturn that portion of the Arkansas Supreme Court's decision that held these Sales Taxes were unconstitutionally imposed upon charges for cable television service for the initial two year period of their existence.

The cable operators and taxpayers submit that the Petitioners' argument that cable television's greater utilization of the public rights-of-way in providing its programming services, as compared to the use of such public rights-of-way by other businesses involved in both the electronic and print segments of the mass communications media in Arkansas, is illogical. This argument does not provide the necessary *compelling* governmental interest that would justify what is otherwise an admittedly discriminatory imposition of Arkansas' state and local Sales Taxes upon charges for cable television service. Therefore, this argument should be rejected by this Court for the same reasons this argument was rejected by the Arkansas Supreme Court below. Governmental economic regulation does *not* provide a basis for

discriminatory governmental taxation and the cable industry's greater use of the public's rights-of-way provides absolutely no basis for the State of Arkansas to discriminatorily impose its otherwise general Sales Tax upon charges for cable television service.

The State of Arkansas' assertion that Arkansas' General Assembly did not intend to discriminatorily impose Arkansas' Sales Taxes upon charges for cable television service because the members of the legislative body were *not* aware of the existence of "scrambled" satellite television broadcast subscription services, and that such discriminatory imposition of the Sales Taxes was eliminated at the first practical occasion, has absolutely no basis in either the evidentiary record in this case or in any legal theory adopted by this Court or any of the highest appellate courts of any of Arkansas' sister states.

ARGUMENTS

I. THE GREATER USE OF THE PUBLIC RIGHTS-OF-WAY BY CABLE TELEVISION DOES NOT ESTABLISH A COMPELLING GOVERNMENTAL INTEREST THAT WILL JUSTIFY THE DISCRIMINATORY IMPOSITION OF ARKANSAS' STATE AND LOCAL SALES TAXES BY ACT 188 OF 1987.

For the two year period from July 1, 1987, through June 30, 1989, [1]Act 188 of 1987 imposed Arkansas' state and local Sales Taxes upon charges for cable television service. However, Arkansas' statutory scheme for imposing Sales Taxes during this same period did not subject the sales of newspapers, magazines by subscription, advertising to sponsor wireless radio and television broadcasts or of "scrambled" satellite broadcast television services to these same state and local Sales Taxes.

In their First Amendment based challenge in this case, the cable operators and their taxpayer-subscribers alleged that their First Amendment rights of free speech and free press were being discriminatorily taxed, in violation of the rationale announced by this Court in its decisions in the cases of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983) and *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987). The cable operators and taxpayers maintain that this discrimination existed in Arkansas' statutory Sales Tax scheme, whether the comparison was made between businesses involved in both the electronic and print segments of the mass communications media (the broader view) or simply between businesses that

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[1]Before the amendment of Act 188 of 1987 by the Arkansas General Assembly's adoption of Act 769 of 1989 (effective July 1, 1989), Arkansas' state and local Sales Taxes were imposed upon charges for cable television services, but virtually upon no other sale of goods or services by other businesses involved in either the electronic or print segments of the mass communications media in Arkansas.

operated within only the electronic segment of the mass communications media (the narrower view).

The State of Arkansas admits on brief (Pet. Br. p. 15) that such discriminatory imposition of Arkansas' state and local Sales Taxes actually existed during this two (2) year period of time. However, the state argues that there were two compelling governmental interests being served by this method of imposing these excise taxes that justified the infringement upon the taxpayers' First Amendment protected rights of "free speech" and "free press."

The Arkansas Revenue Division successfully argued in the trial court that the discriminatory imposition of the state and local Sales Taxes by Act 188 of 1987 could be justified because cable television makes a greater use of the public rights-of-way and causes a greater disruption of public order in providing its programming services than do other businesses involved in either the electronic or print segments of the mass communications media. The Arkansas Revenue Division and the trial court chancellor relied upon dicta set out in three decisions of various federal circuit courts,[2] as support for the proposition that cable television can be regulated *and* taxed differently than other similarly situated businesses involved in the mass communications media in Arkansas.

The Arkansas Supreme Court had no problem in rejecting this faulty reasoning of the Arkansas Revenue Division as *not* providing the required *compelling* governmental interest that is required to be served by such discriminatory imposition of what is otherwise a general Sales Tax. The Arkansas Supreme Court held (Petitioner's App. A, A-3, Docket No. 90-29)

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[2]*Central Communications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 714 (1986); *Omega Satellite Products Co. v. City of Indianapolis*, 649 F.2d 119 (C.A.7, 1982); and *Community Communications, Inc. v. City of Boulder*, 660 F.2d 1370 (C.A.10, 1981).

> There was uncondtradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the public right-of-way. It is true that the use of the public rights-of-way by cable television may be subjected to more regulation as has been suggested in some cases . . . . However, those cases involve regulation related to access to or use of the rights-of-way rather than a tax which has no relationship to the acquisition of the privilege of using public property. We thus find the fact that cable television uses public property and must obtain a franchise to do so should not control the result in this case.

The cable operators and taxpayers submit that this Court should affirm the Arkansas Supreme Court's declaration that Act 188 of 1987 unconstitutionally imposed Arkansas' state and local Sales Taxes upon charges for cable television service during the period from July 1, 1987, through June 30, 1989, by adopting this same reasoning as is set out above.

The state of Arkansas attempts to equate (for purposes of its comparison of similarly situated taxpayers in this case) governmental action in the area of economic regulation of private business to governmental action that imposes taxes. The State of Arkansas makes no distinction in these two forms of exercising governmental power, by alleging that both actions are merely forms of governmental regulation. In its brief (Pet. Br. p. 15), the State of Arkansas maintains—

> However, whether the complaint is made about a Sales Tax, a franchise tax, a franchise grant, or access regulations, it is still a complaint about governmental regulation. Therefore, this distinguishing feature of cable television justifies that differing tax treatment under Act 188 of 1987.

It must be noted that the State of Arkansas now apparently *admits* in its brief that Act 188 of 1987 provides for a

"differing tax treatment" for cable television, as compared to other businesses involved in either the electronic or print segments of the mass communications media. This statement must be taken by this Court as an admission against interest by the State of Arkansas.

However, and more importantly here, cable operators and taxpayers in this proceeding maintain that this Court has never rendered a decision that held that the power to tax and the power to economically regulate were the same. In fact, in the *Minneapolis Star* decision, this Court specifically noted the long line of cases that held that the power to tax is the power to destroy, and that where discriminatory taxation is found among similarly situated First Amendment protected businesses, that a strict scrutiny will be applied and the burden of proof is shifted to the taxing authority to establish a *compelling* governmental interest that is being served by this incidental infringement upon the taxpayers' rights of free speech and free press which interest cannot be met in some other fashion.

The United States Court of Appeals for the District of Columbia, in its decision in *Quincy Cable TV, Inc. v. FCC*, 769 F.2d 1434 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986), a case where that Court struck down the FCC's "must carry" regulations the agency sought to impose on cable television, that circuit court applied a logical and proper analysis of the First Amendment rights of cable television operators and subscribers, and then held (768 F.2d, at 1448-1449):

> It has become something of a truism to observe that "differences and characteristics of news media justify differences in the First Amendment standards applied to them. " . . . The suggestion is not that traditional First Amendment doctrine falls by the wayside when evaluating the protection due novel modes of communication. For the core values of the First Amendment clearly transcend the

> particular details of the various vehicles through which messages are conveyed. Rather, the objective is to recognize that those values are best served by paying close attention to the distinctive features that differentiate increasingly diverse mechanisms through which a speaker may express his views.
>
> * * *
>
> Nor do we discern other attributes of cable television that would justify a standard of review analogous to the more forgiving First Amendment analysis traditionally applied to the broadcast media. We cannot agree, for example, that the mere fact that cable operators require use of a public right-of-way—typically utility poles—somehow justifies lesser First Amendment scrutiny . . . The potential for disruption inherent in stringing coaxial cables above city streets may well warrant some governmental regulation of the process of installing and maintaining the cable system. But hardly does it follow that such regulation could extend to controlling the nature of the program that is conveyed over that system. No doubt a municipality has some power to control the placement of newspaper vending machines. But any effort to use that power as a basis of dictating what must be placed in such machines would scarcely be valid.

The evidentiary record in this case clearly establishes that cable operators in Arkansas pay a franchise fee as "rental"[3] for their use of this public property in the conduct of their cable television businesses (J.A. 78-79, R. 705). The strained logic adopted by the Arkansas Revenue Division (in an attempt to justify its discriminatory taxation of cable television services) i.e. cable television's greater use of the

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[3]For a full discussion of the purpose and extent of these municipal "franchise fees" as "rent" for the use of the public rights-of-way, see the decisions in *Group W Cable, Inc. v. City of Santa Cruz*, 669 F.Supp. 954, 972-975 (N.D. Cal., 1987) and *Century Federal, Inc. v. City of Palo Alto*, 710 F.2d 1559 (N.D. Cal., 1988).

public rights-of-way establishes a compelling governmental interest that is sufficient to overcome the admittedly discriminatory imposition of Arkansas' otherwise generally applicable state and local Sales Taxes to cable television services, but not to charges for other services or products sold by the electronic segment of the mass communications media in Arkansas, should be rejected, out-of-hand, by this Court.

The television programming provided by the "scrambled" satellite broadcast television services in return for the payment of a subscription fee is virtually identical to the programming services provided by cable operators to their subscribers for a subscription fee. Thus, the state's *admitted* discriminatory imposition of its otherwise generally applicable Sales Taxes to charges for cable service, while *not* subjecting charges for "scrambled" satellite subscription service to the same Sales Taxes, is a clear violation of the taxpayer's First Amendment rights of free speech and free press that cannot be justified, in any way, because the cable operators make a greater use of the public rights-of-way than do other businesses engaged in the mass communications media.

Accordingly, the cable operators and taxpayers submit that this Court should affirm that portion of the Arkansas Supreme Court's decision that held the Sales Taxes imposed by Act 188 of 1987 were unconstitutional, because the State of Arkansas has totally failed to carry its burden of establishing a *compelling* governmental interest that was served by such discriminatory taxation. This Court should therefore affirm that portion of the Arkansas Supreme Court's decision below that declared Act 188 of 1987 to be unconstitutional for the same reasons chosen by the Arkansas Supreme Court.

II. THE PETITIONER'S ALLEGATIONS THAT THE MEMBERS OF THE ARKANSAS GENERAL ASSEMBLY LACKED KNOWLEDGE OF THE EXISTENCE OF "SCRAMBLED" SATELLITE

BROADCAST SUBSCRIPTION SERVICES ARE NOT BASED UPON ANY EVIDENTIARY FACTS ESTABLISHED IN THIS CASE AND THERE IS NO LEGAL THEORY ADOPTED BY ANY COURT THAT WOULD JUSTIFY THE ADMITTEDLY DISCRIMINATORY IMPOSITION OF ARKANSAS' STATE AND LOCAL SALES TAXES BY ACT 188 OF 1987.

The State of Arkansas has raised a novel argument in its brief (Pet. Br. pp. 15-18), which argument the state first raised in its Petition for Rehearing before the Arkansas Supreme Court. This argument is that the Arkansas General Assembly was not aware of the existence of "scrambled" satellite television broadcast services when it adopted Act 188 of 1987, and, if there was a discriminatory imposition of Arkansas' otherwise general Sales Taxes upon charges made by providers of and subscribers to "scrambled" satellite services and cable television services, that such unconstitutional discrimination could be justified because it was "unintended" and was corrected during the next regular session of the Arkansas General Assembly.[4] Though the Petitioner here states in his brief that "the record indicates" and he alleges that the testimony of his

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[4]The Respondents here (Petitioners in Docket No. 90-38) have specifically challenged the holding by the Arkansas Supreme Court that the Arkansas General Assembly's adoption of Act 769 of 1989, (in an attempt to extend to Arkansas' state and local Sales Taxes to subscription fees charged for "scrambled" satellite services) has, in fact, cured this admitted discrimination. These Respondents here believe this "curative" legislation was, in fact, "illusory," because most of the charges for "scrambled" satellite services are paid directly to the out-of-state satellite service providers. Therefore, such sales would be sales in interstate commerce that are completed where the subscriber's check is received, not a sale completed in Arkansas that would ever be subject to Arkansas' state and local Sales Taxes.

Sales and Use Tax Manager[5] forms a sufficient factual record upon which to base the state's argument that it did not "intend" to discriminate against the sale of cable television services when the Arkansas General Assembly enacted Act 188 of 1987, the argument must fall because it has no factual basis. The Petitioner's allegations that the Arkansas General Assembly cured such discrimination in a timely fashion, once the state "discovered" the "satellite television industry through the testimony in this case," are also baseless. These arguments must be rejected by this Court because there is absolutely no testimony or documentary evidence in the record in this case that would substantiate these mere allegations by the Petitioner in his brief.

The cable operators and the taxpayers submit that there is not only no factual basis for these arguments, they also maintain that there is no legal basis for these arguments either. The evidentiary record in this case is "totally" devoid of any evidence offered by Petitioner Pledger to establish the facts he has either eluded to or alleged in his brief (Pet. Br. 15-18).[6] Therefore, they believe that this specious argument by the Petitioners should be rejected, out-of-hand, by the members of this Court.

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[5]This testimony has no relation to the Petitioners' allegations in his brief concerning the Arkansas General Assembly's alleged lack of knowledge about "scrambled" satellite services, since this Tax Manager was a member of the Executive Branch of Arkansas' state government, not its Legislative Branch, and his motives or knowledge cannot be transferred or attributed to an entirely different branch of state government.

[6]The Respondents here cannot help but point out to this Court that Petitioner Pledger offered absolutely no documentary evidence and very little testimony in the trial court in the State of Arkansas' defense of Act 188 of 1987. Instead, the State of Arkansas appears to have rested its defense in this case primarily upon the mere evidentiary presumption of constitutionality that is accorded legislative acts. The quoted testimony of Gail Price, the Manager of the Sales and Use Tax Section of the Arkansas Revenue Division is *not* relevant to this argument by the Petitioner, and the state fails to cite to even one other page in the evidentiary record or the Joint Appendix to testimony or documents that would factually support this argument.

Notwithstanding the fact that the Petitioner alleges that the Arkansas General Assembly acted in a timely fashion in 1989 by adopting Act 769 of 1989 in an attempt to also extend the state's Sales Taxes to subscription fees charged for "scrambled" satellite television broadcast services, the cable operators and taxpayers point out that the testimony of the same Sales and Use Tax Manager relied upon by the Petitioner in this regard actually refutes the state's argument.

In their original Complaint (R. 1) filed in May of 1987, the cable operators and taxpayers alleged that the Arkansas General Assembly's failure to impose Arkansas' state and local Sales Taxes upon charges for "scrambled" satellite television broadcast subscription fees was one factor that caused the imposition of these excise taxes by Act 188 of 1987 to be unconstitutionally discriminatory in light of their First Amendment based challenge. At the August 19, 1987,[7] evidentiary hearing on the taxpayers' Preliminary Injunction to create an escrow account, the Executive Secretary of ACTA (JA 52-54, R. 672-674) and one of the ACTA cable operators (JA 83-85, R. 711-712) both testified about the existence of subscription fees for "scrambled" satellite television services. At that same hearing, the Arkansas Revenue Division's Sales and Use Tax Section Manager testified (JA 119-120, R. 753-754):

> Q. On the satellite—you've been in the Courtroom today and heard the testimony by the other witnesses.
>
> A. Yes.

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[7]This evidentiary hearing took place less than three months after this class action suit was filed and less than five months after the Arkansas General Assembly had adjourned its Regular Session in the spring of 1987.

Q. The satellite transmission of either radio signals, such as the Arkansas Radio Network or the HBO, to a dish owner, there's testimony that there is a charge for that service. Is that subject to sales tax in the State of Arkansas? That service charge?

A. Say that again. I think—

Q. (Interposing) The HBO signal, I believe Plaintiff's Exhibit Number Two, was a listing of the scrambled services.

A. Right. Correct.

Q. And you can pay a monthly charge and have it unscrambled so you can receive it. I think Senator Bumpers has complained about the amount of the charge. But does that State of Arkansas impose a sales tax upon the providing of that service, that video service, to the individual owner or the amount he pays in gross proceeds. Is there a sales tax imposed upon that?

A. No, there is not.

Q. There is upon the delivery of that HBO program by a cable system, because of the provisions of Act 188 of 1987. Is that correct?

A. Correct, yes.

Q. Prior to the adoption of that Act, there was no sales tax imposed upon the providing of that service by cable television?

A. That's correct.

This testimony by the state's tax administrator alone refutes Petitioner Pledger's allegation in his brief (Pet. Br. 17) that—

> The Arkansas General Assembly acted at the earliest opportunity to correct what was suggested to be, but at the time not proven to be a difference in the tax treatment of two similar services, cable television service and satellite service.

The 76th Arkansas General Assembly met in "special session" no less than four (4) times in 1987 and 1988[8] *after* this "test" case was instituted to challenge the constitutionality of Act 188 of 1987. The Appellants submit that the Arkansas General Assembly's adoption of Act 769 of 1989 (at the urging of the Revenue Division)[9] occurred *only* after the parties had submitted their legal briefs in the Arkansas trial court and the state tax administrators (not the Arkansas General Assembly) finally became aware of the blatant and admitted discrimination that existed in the imposition of Arkansas' state and local Sales Taxes upon the charges made for providing similarly situated television programming among these businesses involved in the electronic segment of the mass communications media.

The cable operators and taxpayers submit that the "intent" of the Arkansas General Assembly in adopting either Act 188 of 1987 or Act 769 of 1989 was immaterial, where the evidentiary record compiled in this case establishes (and the tax administrator admits on brief) that discrimination in the imposition of the challenged state and local Sales Taxes actually existed. In this Court's

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[8]First Extraordinary Session (June 2-5, 1987); Second Extraordinary Session (October 6-9, 1987); Third Extraordinary Session (January 26-February, 1988); and Fourth Extraordinary Session (July 11-14, 1988). See Appellants' Response to Appellees' Petition for Rehearing before the Arkansas Supreme Court (p. 4)

[9]See the admissions attributed to the Arkansas Commissioner of Revenues during the time that Act 769 of 1989 was pending before the Arkansas General Assembly i.e. the purpose of this act was to lessen the discrimination of the Sales Tax in a Court case then pending on cable television (Plaintiffs' Motion for Judicial Notice, filed March 6, 1989, Exhibit A, R. 577 at 583).

Minneapolis Star decision, *supra*, Justice O'Connor stated (460 U.S., at 592-593):

> We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of a First Amendment . . . . We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment . . . . A tax that singles out the press or that targets individual publications within the press, places a heavy burden on the state to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment, and the judgment below is reversed. (Citations omitted).

The State of Arkansas cites no decision of this Court as authority for its proposition that it should *not* be held to the established standard of not imposing its excise taxes discriminatorily on businesses in the mass communications that are providing similar programming and which are protected by the First Amendment's rights of "free speech" and "free press." The home satellite television industry has existed in the United States for more than fifteen years, and the Petitioner's arguments based upon alleged surprise and lack of knowledge on the part of the Arkansas General Assembly, in light of the admittedly discriminatory imposition of an otherwise general Sales Tax by Act 188 of 1987, should be rejected by this Court because the "intent" of this legislative body is not controlling.

In the *Arkansas Writer's Project* case, the discriminatory exemption among magazines (that was successfully challenged in that case) had been on the Arkansas statute books for more than forty (40) years before it was declared unconstitutional. Surely, the fact that such discrimination went unchallenged for forty years did not estop the affected taxpayer from raising a valid constitutional challenge of discriminatory taxation, because the Arkansas General Assembly did not "intend" to

discriminate against general interest magazines when it adopted the exemption.

Arkansas did not attempt to impose its Sales Taxes upon cable television service until 1987. Therefore, the Respondents here submit that the Arkansas General Assembly's actions in discriminatorily imposing the state's Sales Taxes upon charges for cable television service by the adoption of Act 188 of 1987, while not taxing the subscription fees for virtually identical television programming provided by "scrambled" satellite television services, adequately forms the basis for holding such legislative action unconstitutional. The Arkansas Supreme Court below so held on these same grounds. Thus, the Respondents here submit that the Arkansas Supreme Court's decision regarding the unconstitutionality of Act 188 of 1987 should be affirmed.[10]

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[10]The Respondents here (Petitioners in Docket No. 90-38) have raised the argument that the Arkansas Supreme Court's comparison of similarly situated businesses within the mass communications media in Arkansas was too narrow and limited, and that the Arkansas Supreme Court erred in not adopting the broader test of also comparing businesses in the print segment of the mass communications media with businesses involved in the electronic segment of the mass communications media, as was done by both the Oklahoma Supreme Court in *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla., 1990) and the New York Court of Appeals in its adoption of the New York intermediate appellate court's decision in *McGraw-Hill, Inc. v. State Tax Commission*, 541 N.Y.S.2d 252 (App. Div. 3 Dept., 1989), *affirmed and adopted*, 252 N.E.2d 163 (N.Y., 1990). The Arkansas General Assembly clearly knew, in 1987, that the sale of newspapers and certain magazines by subscription were *not* subject to Arkansas' Sales Taxes. Thus, there existed a pattern of discriminatory imposition of Arkansas' state and local Sales Taxes among businesses involved in the print and electronic segments of the mass communications media, notwithstanding any allegation by the petitioner here concerning the lack of "intent" in the imposition of such taxes upon charges made for the providing of "scrambling" satellite television services to subscribers in Arkansas.

CONCLUSION

For the foregoing reasons, the cable operators and taxpayers respectfully request that this Court will affirm the portion of the decision rendered by the Supreme Court of Arkansas which held that the state and local Sales Taxes imposed by Act 188 of 1987 were unconstitutional, for the taxable periods that occurred between July 1, 1987, and June 30, 1989.

Respectfully submitted,

December 15, 1990

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